But there is eminent authority for the view that the bailee's right also depended originally on a liability to the bailor which has since disappeared;[17] and if this be true, the analogy between the tenant and bailee is perfect.

RENTS, PROFITS AND INTEREST IN SPECIFIC PERFORMANCE.—The sealing of a contract for the sale of land is sometimes said to work a conversion so as to pass the equitable title to the vendee, vesting in the vendor the ownership in equity of the purchase money.[1] The inaccuracy of such a statement is evident from the fact, among others, that intermediate the making of the contract and the date for performance, the rents, issues, and profits, go to the vendor.[2] If the conversion occurred by virtue of the sealing of the contract, the vendee, having the equitable title to the land, seems entitled to the rents and profits, and the vendor should have interest on the purchase money. But although land has always been considered the proper subject of a trust, courts have never gone to the extent of treating purchase money as a *res*.[3] As a matter of fact, therefore, the vendor does not own the purchase money either in law or in equity, and is not entitled to interest until after the date for performance;[4] and, on the theory that it would be most inequitable to allow the vendee not only the interest on his money, but also the rents and profits of the land, the vendor may retain the rents and profits until the time for performance.[5]

After the date for performance, or after performance, the rights of the parties are reversed. Inasmuch as equity will not permit the vendor to profit by his own default, the vendee becomes entitled to the rents and profits of the land after the date for performance,[6] and

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[17]2 Pollock & Maitland, History of English Law, 170-172.

[1]Seton *v.* Slade (1802) 7 Ves. Jr. *265, *274; Lysaght *v.* Edwards (1876) L. R. 2 Ch. Div. 499, 507.

[2]Lumsden *v.* Fraser (1841) 12 Sim. 263. For a discussion of the incidents and a criticism of the theory of equitable conversion, see article by Prof. H. F. Stone entitled "Equitable Conversion by Contract", 13 Columbia Law Rev., 369.

[3]The right of the vendor to specific performance has been said to rest on some theory of mutuality; but it is really based on the equitable rights and obligations of the parties. The vendor holds the property as security for the purchase price, somewhat as a mortgagee, and as he is subject to similar restrictions and liabilities, he is given corresponding rights. As equity does not consider time of the essence, it allows specific performance by the vendee after the date for performance. In order to give the vendor power to cut off this right, he may bring his bill for specific performance, which is analogous to the mortgagee's bill for foreclosure. J. B. Ames, 3 Columbia Law Rev., 1, 12. His right has never been based on the theory that he was enforcing a trust. See Jones *v.* Newhall (1874) 115 Mass. 244.

[4]Minard *v.* Beans (1870) 64 Pa. 411.

[5]Lumsden *v.* Fraser, *supra*.

[6]Phillips *v.* Sylvester (1872) L. R. 8 Ch. App. 173; see Davy *v.* Barber (1742) 2 Atk. *489; Bostwick *v.* Beach (1886) 103 N. Y. 414, 423. If the vendor resumes possession of the premises, he must pay an occupation rent to the vendee; Peck *v.* Ashurst (1895) 108 Ala. 429; likewise, if he retains possession; Dyer *v.* Hargrave (1805) 10 Ves. Jr. *505; but not where the vendee is wilfully in default. Leggott *v.* Metropolitan Ry.

must pay interest on the unpaid purchase price.[7] The same result is reached where the contract has not been performed. If in the first case, however, as frequently happens, the rents and profits of the land amount to less than the interest on the purchase money, the vendee may retain the interest by allowing the vendor the rents.[8] Should the contract contain no provision for the date of taking possession, the vendee owes interest only from the time possession is taken,[9] or from the time the condition of the title is such that possession can reasonably be taken.[10] Where the delay in transferring title is caused by the vendor, but without his active fault, the vendee must pay interest if he is in possession, or has received rents. It also seems that an inexcusable refusal on the part of the vendor to convey title, or to receive the purchase money, deprives him of all claim to interest.[11] Where the contract contains a provision that interest shall be payable from a certain date, even though "from any cause whatever" the purchase money shall not then be paid, it is well settled that unless the vendor wilfully defaults, mere inability on his part to perform will not prevent the running of interest from the date set.[12] It is universally held that where the vendee is not in possession, he is under no obligation to pay interest until the seller is able to convey a good title.[13]

In the recent case of *Wilson* v. *Seybold* (D. C. W. Va. 1914) 216 Fed. 975, an option for the sale of land was accepted in May, 1906. In March, 1912, the vendor, after years of litigation, was finally awarded title to the property by a judicial decision, and in May, 1913, the vendee paid the purchase price into court and notified the vendor of the fact. In a suit for specific performance by the seller, it was held

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(1870) L. R. 5 Ch. App. 716. The vendee, however, is entitled to dividends on stock contracted to be sold. Currie *v.* White (1871) 45 N. Y. 822; Black *v.* Homersham (1878) L. R. 2 Exch. Div. 24; see Phinizy *v.* Murray (1889) 83 Ga. 747.

[7]McKay *v.* Melvin (N. C. 1840) 1 Ired. Eq. 73; Minard *v.* Beans, *supra*; see Davy *v.* Barber, *supra*. The same rule applies where the vendee brings an action for, and recovers, rents. Covell *v.* Cole (1867) 16 Mich. 223. But where the purchase price is payable only on delivery of the deed, unless that condition is complied with, or the vendee is given possession of the land, there is no obligation to pay interest. Armstrong *v.* Maryland Coal Co. (1910) 67 W. Va. 589. The vendee, however, must pay taxes accruing after he has entered into possession. Miller *v.* Corey (1863) 15 Ia. 166; Anderson *v.* Harwood (1892) 47 Mo. App. 660.

[8]Dias *v.* Glover (N. Y. 1839) 1 Hoff. Ch. *71; Worrall *v.* Munn (1873) 53 N. Y. 185; see Esdaile *v.* Stephenson (1822) 1 S. & S. 122.

[9]Fludyer *v.* Cocker (1806) 12 Ves. Jr. *25; Cleveland *v.* Burrill (N. Y. 1857) 25 Barb. 532.

[10]See Binks *v.* Lord Rokeby (1818) 2 Sw. 222.

[11]Hart *v.* Brand (Ky. 1818) 1 A. K. Marsh. *159; King *v.* Ruckman (1873) 24 N. J. Eq. 556; Atchison, T. & S. F. R. R. *v.* Chicago & W. I. R. R. (1896) 162 Ill. 632. In such a case, the vendor must reimburse the vendee for any damages or waste to the land subsequent to the making of the contract. Phillips *v.* Sylvester, *supra*; Worrall *v.* Munn, *supra*.

[12]Cowpe *v.* Bakewell (1851) 13 Beav. 421; Vickers *v.* Hand (1859) 26 Beav. 630. The vendee cannot claim the rents and profits where he is excused from paying interest because of the vendor's wilful default. Hayes *v.* Elmsley (1893) 23 Can. S. C. 623.

[13]Lombard *v.* Chicago Sinai Congregation (1874) 75 Ill. 271; see Grove *v.* Bastard (1851) 1 DeG. M. & G. *69; *cf.* Carrodus *v.* Sharp (1855) 20 Beav. 56.

that the purchaser must pay interest on the purchase price from March, 1912, until May, 1913. The decision is obviously correct. The vendee, by a definitive appropriation of the purchase price, with notice to the vendor, may stop the running of interest.[14] But there was a period between the two dates when the vendor was in a position to convey title to the property, and according to the rules above outlined, the vendee should be obliged to pay interest for that interval. Although the case did not decide the point, it seems, also, that the vendee is entitled to the rents and profits of the land during that period.

ADMISSIBILITY OF EXTRINSIC EVIDENCE TO ESTABLISH AN INSTRUMENT AS A WILL.—The courts are frequently called upon to determine whether a certain instrument is to operate as a testamentary disposition of the maker's property. The law has made no particular form or technical language requisite to the validity of a will,[1] and although a writing purports on its face to be an assignment, a letter, or a deed, it may nevertheless be effective as a will.[2] The particular name given to it by the maker, or his belief as to its character, while evidence of his intention, are not in themselves conclusive. The fundamental test in each case is the intention of the maker with reference to the effect the instrument should have. Did he intend that it should operate to convey a present, irrevocable interest, or was it to pass no interest until after his death? If the latter, it is his will regardless of its form, and effective as such, if executed in the manner required by the Statute of Wills.[3] The question then arises as to how the court, in a given case, is to ascertain the intention of the maker. It may be definitely expressed by the terms of the instrument; or, as often happens, it may be doubtful from the form of the writing, or from the expressions employed, whether it was intended to have a present or a posthumous effect. In the latter case, the authorities are in accord in admitting extrinsic evidence to aid the court in finding the true intention.[4]

Cases often arise, however, where no indication whatever as to the maker's intention is apparent, except from the form of the instrument. For example, a writing in form a will, and properly executed

[14]Dyson *v.* Hornby (1851) 4 DeG. & Sm. 481; Bostwick *v.* Beach, *supra*; see Steenrod *v.* Wheeling etc. R. R. (1885) 27 W. Va. 1. It has been intimated that a notice of rescission of the contract has the same effect. See Rutledge *v.* Smith (S. C. 1826) 1 McC. Ch. 399. The money so appropriated, however, does not belong to the vendor, and any gain or loss is the vendee's. Roberts *v.* Massey (1807) 13 Ves. Jr. *561. Where the contract provides for the payment of interest from the date set for performance, an appropriation of the purchase money, even though with notice to the vendor, will not stop the running of interest. *In re* Riley (1886) L. R. 34 Ch. Div. 386.

[1]Gardner, Wills, § 31.

[2]Robinson *v.* Brewster (1892) 140 Ill. 649, 659; Barney *v.* Hays (1892) 11 Mont. 571; Jordan *v.* Jordan's Admr. (1880) 65 Ala. 301; Sperber *v.* Balster (1881) 66 Ga. 317. If the instrument passes an interest *in praesenti*, though the right of enjoyment be postponed until the death of the maker, it is nevertheless a deed. Lauck *v.* Logan (1898) 45 W. Va. 251.

[3]Schouler, Wills, §§ 265, 272.

[4]Robertson *v.* Dunn (1812) 6 N. C. 133; Kelleher *v.* Kernan (1883) 60 Md. 440; Sharp *v.* Hall (1888) 86 Ala. 10.